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NO. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HERMAN SANFORD BENNETT

Petitioner

-vs.-

THE STATE OF TEXAS

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
RULE 21.1 (k)

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APPENDIX 1

IN THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

NO. 3-83-083-CR

DENNEY EDWARD ROBERTS,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

NO. 3-83-084-CR

HERMAN SANFORD BENNETT,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
98th JUDICIAL DISTRICT
NO. 65,435, HONORABLE HUME COFER, JUDGE

Appellants were jointly tried and convicted for possession of a controlled substance, namely: methamphetamine of 28 grams or more, and less than 400 grams. The district court in a bench trial assessed punishment in the Texas Department of Corrections at ten years for Bennett and four years for Roberts. Each appellant raises four grounds of error. Three of the four grounds of error are common to both appellants and addresses the warrantless forced entry of their home. Appellant Bennett also complains that the trial court erred in overruling his motion for dismissal because he was not given a speedy trial whereas appellant Roberts claims the evidence was insufficient to sustain his conviction. We overrule appellants' grounds of error and affirm the judgment of the trial court.

Both appellants were arrested on January 16, 1982. Earlier that day Officer Foree of the Austin Police Department spoke to a female known as "Eddie." The conversation between Officer Foree and "Eddie" concerned the purchase of a quarter-pound of methamphetamine. The police officer met "Eddie" at a cafeteria parking lot on West 38th Street and followed her to a laundromat on West Lynn where "Eddie" said she would deliver the drug.

"Eddie" told the officer to wait at the laundromat and she would return shortly with the drug. Other officers followed "Eddie" to appellants' house which was a few blocks from the laundromat. "Eddie" returned to the laundromat at about 12:30 p.m. with a "sample" of the drug. She returned to appellants' house to pick up the quarter-pound she promised but returned empty-handed. No one at the house would open the door and let her in. "'Eddie" then told the officer to meet her at the laundromat around 1:30 p.m. At this time "Eddie" left the laundromat and was not followed. Additional officers were, however, stationed in a pick-up truck camper maintaining surveillance outside appellants' house during this time.

"Eddie" returned to appellants' house around 2:10 p.m. She then drove back to the laundromat, delivered a quarter-pound of methamphetamine to Officer Foree at 2:35 p.m., and was arrested. While "Eddie" was being arrested at the laundromat, officers in the camper at appellants' house observed a white male drive up and enter the house. Later, the officers noticed someone looking out the front window. The officers who had arrested "Eddie" then gave the order for the other officers in the camper to enter appellants' house to "maintain the status quo" (*i.e.*, prevent the escape of the appellants) pending the issuance of a search warrant. The police

officers entered appellants' house through the front door after breaking it down with a sledgehammer.

After obtaining a search warrant, the officers found a sizable quantity of methamphetamine in the bedroom. The circumstances are set forth in the affidavit upon which a search warrant was ultimately issued. At the hearing on their motion to suppress evidence obtained by a warrantless search of the residence, appellants stated that they do not dispute the accuracy of the events surrounding the search, as those events are described in the affidavit, namely:

1. The affiant met "Eddie" at a cafeteria pursuant to four previous telephone conversations which culminated in an arrangement for the affiant to purchase from "Eddie" a quarter-pound of methamphetamine.

2. "Eddie" and the affiant drove to a laundromat near the residence in question. "Eddie" left *to obtain the methamphetamine.* Unknown to her, she was under police surveillance.

3. Police officers saw her drive from the laundromat to the residence, enter the residence, emerge from it, and drive again to the laundromat. She delivered a "sample" of methamphetamine to the affiant.

4. She left the laundromat again *to obtain the quarter-pound of methamphetamine*, again under police surveillance. She drove to the residence but did not enter the house. She drove back to the laundromat where she stated to the affiant that "the people would not open the door" and that he should meet her again at the laundromat between 1:30 and 1:45 p.m. She stated further "that the sample had come from *the* quarter pound of methamphetamine" and "that there was more methamphetamine available."

5. At approximately 2:10 p.m., surveillance officers saw "Eddie" arrive at the residence in her automobile. They saw her park in front of the house, enter it, remain for about 15 minutes, leave the house, and drive to the laundromat where "affiant was supposed to meet her." On arriving there, she entered the affiant's automobile and handed to him what was proved to be a quarter pound of methamphetamine. "At this point, she asked (affiant) for the $5,000 which had been agreed upon to purchase the quarter-pound of methamphetamine," explaining that "she needed to return with the money as quickly as possible because the people were about to leave." The affiant then "signalled" the surveillance officers to arrest "Eddie."

6. *Within a period of about 10 minutes* after "Eddie" had last left the residence (with the quarter-pound of methamphetamine), surveillance officers saw a white male drive to the residence in a Plymouth Duster automobile. He parked the car and entered the residence.

7. The affiant continues:

> Over the next ten minutes surveillance officers observed several subjects looking out the windows at [appellants' home] . . . It appeared to the Officers on surveillance that the subjects inside the residence were waiting for someone to return. Due to the fact that [Eddie] advised this affiant that the subjects were about to leave, and also due to the fact that the white male in the brown Plymouth Duster . . . had gone to the residence, the decision was made to secure the individuals inside the residence prior to obtaining this warrant.

The foregoing circumstances raise two distinct legal problems best considered separately: (1) whether probable cause existed for the police to enter the residence and seize the contraband, with or without a warrant; and (2) whether the affidavit showed "exigent circumstances" justifying the officers' decision to search and seize the additional contraband, to which "Eddie" had referred, *without* first receiving the warrant authorizing a search of the residence. Included within the second problem is an issue arising from the manner in which the officers effectuated the search—that is, without notice to the occupants of the residence and by smashing down the door with a sledge hammer.

PROBABLE CAUSE

Probable cause exists where the facts and circumstances within the knowledge of police officers on the scene, and of which they have reasonable trustworthy information, would lead a man of reasonable caution and prudence to believe that he will find in the place to be searched evidence pertaining to a crime. Graves v. State, 513 S.W.2d 57 (Tex. Cr. App. 1974).

We feel that a man of reasonable caution and prudence would conclude from "Eddie's" actions and statements, and the independent observations of police officers, that the additional methamphetamine would be found in the residence. The connection between the residence and the methamphetamine was

not conjectural, for "Eddie" had twice returned from there to the laundromat where she delivered quantities of methamphetamine. On the last occasion, she asked for the purchase money, stating that she needed to return with it because "the people" were about to leave. She specifically stated that more methamphetamine was available, implying that it was obtainable from the same location where she had obtained the sample. The affidavit twice attributes to her going to the residence for the *purpose* of getting the quarter-pound of methamphetamine she had agreed to sell and deliver to the affiant. The context in which all of the events occurred was the sale and delivery of contraband at the very laundromat where "Eddie" directed the affiant to wait and to which she drove from the residence. The connection between the residence and the additional contraband was strong, direct, and immediate. The search was justified by probable cause. Washington v. State, 660 S.W.2d 533 (Tex. Cr. App. 1983).

EXIGENT CIRCUMSTANCES

Were the police justified by exigent circumstances in entering the residence without a warrant and seizing the additional contraband to preserve it as evidence? We conclude the warrantless search was justified by: (1) "Eddie's" statement to the affiant that she required the purchase money immediately in order to return to where she had obtained the contraband "because the people were about to leave"; (2) The surveillance officers' observations of the residence which included the arrival of the Plymouth automobile, the entry of the driver into the residence, and his waiting with the other inhabitants, all of which occurred within 10 minutes of "Eddie's" leaving the residence and implied that the Plymouth automobile was likely the intended means by which some or all of the occupants *would leave the scene with the additional contraband if "Eddie" did not return very quickly;* (3) the surveillance officers' observations of anxiety on the part of the inhabitants of the residence—an emotion imputed to them by the affiant and, no doubt, a shorthand description of the totality of the inhabitants' activities as observed by the officers; and (4) the officers' reasonable belief that the additional contraband was, indeed, within the residence as "Eddie" had stated.

It has been said that "furtive movements or gestures alone are insufficient" to establish probable cause for a search. Smith v. State, 542 S.W.2d 420, 421-422 (Tex. Cr. App. 1976). On the other

hand, "[f]urtive movements are valid indicia of the mens rea and, when *coupled* with reliable information or other suspicious circumstances relating the suspect to the evidence of crime," they may constitute probable cause for a search. *Id.* (emphasis added). Here, the observations by the officers of the individuals in the residence, in light of the *other* information and suspicious circumstances known to them about the planned transaction and the connection between Eddie, the methamphetamine, and the residence, reasonably justified a conclusion that those individuals were, indeed, about to leave the residence with the additional contraband if Eddie did not quickly return. Therefore, the police were justified in entering the residence without a warrant to detain the individuals therein, and to seize the additional contraband if any existed there as "Eddie" had stated. United States v. Santana, 427 U.S. 38 (1976); Warden v. Hayden, 387 U.S. 38 (1967).

Appellants, on the other hand, contend the trial court overruled their motion to suppress soley because it found the exigent circumstances requirement satisfied by the physical properties of methamphetamine which allow for its quick and easy destruction. Appellants then reason that this "controlled substances rationale" is an impermissible basis for a warrantless search under Johnson v. United States, 333 U.S. 10 (1948), and so it is when no *additional* factors intervene. In *Johnson*, for example, the Court conceded that the result might have been different if the "suspect was fleeing or likely to take flight" or where "evidence or contraband was threatened with removal or destruction" under idependent evidence of those facts. Here, however, these additional facts *are* present: "Eddie" did obtain methamphetamine from the residence and state that more was available; and she stated that "the people" who had furnished her the methamphetamine were "about to leave," a conclusion substantiated by the observations of police officers and their view that the occupants of the residence appeared ready to leave in the Plymouth automobile and with the additional contraband.

The trial court properly overruled for an independent reason appellants' motion to suppress evidence of the contraband found in the residence. It is provided as follows in Tex. Code Cr. P. Ann. art. 14.04 (1977):

> Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to

> escape, so that there is no time to procure a warrant, such officer may, without warrant, pursue and arrest the accused.

The affidavit shows, in the present case, that the officers decided to enter the residence and detain the occupants, while awaiting the issuance of a search warrant, on the representation by "Eddie" that the occupants were about to leave and the officers' independent observation that an automobile had recently arrived at the residence, as well as their observation that the occupants appeared to be waiting anxiously for "Eddie's" return. "A person is arrested when he has been actually placed under restraint . . . by an officer or person arresting without a warrant." Tex. Code Cr. P. Ann. art. 15.22 (1977).

The Court of Criminal Appeals has assigned the following meaning to article 14.04 quoted above:

> We hold Art. 14.04, supra, does not require a showing that the offender is fact was about to escape, nor does it require a showing that there in fact was no time to procure a warrant. The statute merely requires a showing that *the officer was acting upon satisfactory proof from representations by a credible person that the felony offender "is about to escape, so that there is no time to procure a warrant."*

Fry v. State, 639 S.W.2d 463, 476 (Tex. Cr. App. 1982, on State's motion for rehearing) (emphasis added). We conclude that the officers, in their invasion of the residence, were shown to be "acting upon satisfactory proof from representations by a credible person that" the occupants were about to escape. "Eddie" was shown by the affidavit to have been a credible person, owing to her punctilious fulfulling of her engagements with the affiant and her faithful execution of the illicit bargain to sell the quarter-pound of methamphetamine. She specifically stated to the affiant that the individuals who furnished the contraband were about to leave. And, of course, her report was buttressed by the independent observations of the police officers on the scene. The arrest of the occupants being lawful, the contraband discovered in the arrest was not the product of an unlawful search and seizure. Fry v. State, *supra.*

THE MANNER OF POLICE ENTRY

The last distinct legal problem raised by the affidavit is related to the officers' decision to search the residence without a warrant. They effectuated the search without notice to the occupants of the house of their authority and purpose and by smashing in the door. The initial, natural, and emotional response to this manner of police entry is one of revulsion. This is not, however, the end of the matter. There are legal rules raised by the officers' manner of entry and we may not omit to consider the real, rough, and often-dangerous and fluid circumstances in which these rules are required to operate.

Weighing all those circumstances, including the importance of the constitutional right involved, we conclude from the record that the manner of entry was not unreasonable or fundamentally unfair *in the circumstances*. Ker v. California, 374 U.S. 23 (1963). We may not judge the officers' conduct solely by hindsight. The conduct of the occupants of the residence was reasonable grounds for a belief that they might well have been expecting that "Eddie" had aroused police suspicion and her failure to return quickly might signal the arrival of police at the residence. In any event the search was not rendered invalid by the manner of entry.

Appellant Bennett's fourth ground of error complains that the trial court erred in overruling his motion to dismiss for failing to afford him a speedy trial. Bennett was arrested January 16, 1982 and indicted on May 9, 1982. The State announced it was ready for trial on March 11, 1982. Appellant's name in the indictment read "Herman Roberts," not "Herman Bennett." Bennett's indictment was corrected November 15, 1982 and trial was held December 13, 1982.

Bennett argues that from March 9 to November 15 a conviction could not stand. This error in the the indictment, however, was easily correctable as the Code of Criminal Procedure allows the State to correct such errors prior to trial. Tex. Code Cr. P. Ann. art. 26.08 (1966). Even counting the days from January 16, 1982 (the date of arrest) to March 9, 1982 (The date Bennett was indicted under the name "Roberts") and the dates from November 15, 1982 (the date the indictment was corrected) to December 13, 1982 (the date of trial), the total number of days is 81, well within the time limit prescribed by Tex. Code Cr. P. Ann. art. 32A.02, § 1(1) (Supp. 1984). The time from March 11, 1982 until November 15, 1982 does not count as the State announced it was ready for

trial during this time. "The Speedy Trial Act does not require that the State be ready with a perfect indictment or information." Ward v. State, 659 S.W.2d 643, 647 (Tex. Cr. App. 1983). We hold that appellant Bennett has not sufficiently rebutted the State's good faith announcement of him ready for trial; accordingly, Bennett's fourth ground of error is overruled.

Appellant Roberts' fourth ground of error complains that the evidence is insufficient to sustain his conviction for possession of methamphetamine of 28 grams or more, contending that the State did not prove an affirmative link between him and the drug found in the bedroom. In order for the State to establish this affirmative link, it must prove "(1) that the accused exercised care, control, and management over the contraband, and (2) that the accused knew the matter possessed was contraband." Heltcel v. State, 583 S.W.2d 791, 792 (Tex. Cr. App. 1979). Where two people are involved, as in this case, there must be other independent factors to link the accused with the drug. Williams v. State, 498 S.W.2d 340 (Tex. Cr. App. 1973). Some of these factors include whether the place the drugs were found was enclosed, whether the drugs were conveniently accessible to the accused, whether the accused was the owner of the place where the drugs were found. Deshong v. State, 625 S.W.2d 327 (Tex. Cr. App. 1981).

In the present case, Roberts was living at the house where the drugs were found. Roberts moved in with Bennett sometime in December, 1981 and was living there at the time of his arrest, January 16, 1982. The drugs were found in the bedroom of the house. This was the only bedroom of the house, it was clearly accessible to Roberts, and, of course, the bedroom was enclosed (*i.e.* it was not open to the public as, for example, a porch would be). We conclude that the evidence is sufficient to sustain Roberts' conviction.

Having considered and overruled both appellants' grounds of error, we affirm the judgment of conviction by the trial court of both appellants.

Jim Brady, Justice

[Before Justices Shannon, Powers and Brady]
Affirmed
Filed: June 13, 1984
[Not Published]

APPENDIX 2

DENNY EDWARD ROBERTS,
Appellant

NO. 1033-84 v.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review from the Court of Appeals, Third Supreme Judicial District of Texas (TRAVIS COUNTY)

HERMAN SANFORD BENNETT,
Appellant

NO. 1034-84 v.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review from the Court of Appeals, Third Supreme Judicial District of Texas (TRAVIS COUNTY)

OPINION ON APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

These are appeals from convictions for the offense of possession of a controlled substance, specifically, methamphetamine, of more than 28 grams and less than 400 grams for appellant Bennett and less than 28 grams for appellant Roberts. See Art. 4476-15, Sec. 4.03(a) and (d)(2), V.T.C.S. See also Art. 4476-15, Sec. 4.02(b)(6), V.T.C.S. Trial was before the court and punishment was assessed at ten years for appellant Bennett, and four years for appellant Roberts. The Third Court of Appeals (Austin), in an unpublished opinion, affirmed the judgment of the trial court holding, inter alia, that there was a valid warrantless arrest of appellants. Roberts v. State, No. 3-83-083-CR (Tex. App. [Austin] 1984). We granted appellants' petition for discretionary review to examine this holding.

In January 1982, Officer Delbert Foree of the Austin Police Department's Narcotics Detail spoke four times with a female known to him as "Eddie," regarding the purchase of one quarter-pound of methamphetamine. On the morning of January 16, 1982, Officer Foree met with "Eddie" in a parking lot of a cafeteria in Austin. Seven other narcotics officers were on the scene conducting surveillance. "Eddie" instructed Officer Foree to follow her to a laundromat. There Foree remained with "Eddie's" ten-year-old daughter, while she left the laundromat to go pick up the quarter-pound of methamphetamine.

The surveillance officers followed "Eddie" to a house at 1613 West 9th Street in Austin. This house was just five minutes away from the laundromat where Foree was waiting. "Eddie" arrived there at 12:15 p.m. and left at 12:30 p.m. She returned to the laundromat and gave Foree a "sample" of the methamphetamine. "Eddie" left the laundromat to get the remaining quarter-pound of methamphetamine. The surveillance officers again followed her to the house at 1613 West 9th Street, and back to the laundromat where, at 12:45 p.m., she informed Foree that the subjects there would not open the door. "Eddie" told Foree that the sample had come from the quarter-pound of methamphetamine in question and that there was more available than just the quarter-pound that he was to purchase. "Eddie" further suggested that Foree meet her again at the laundromat between 1:30 p.m. and 1:45 p.m.

The surveillance officers who were stationed at the house observed "Eddie" arrive there at 2:10 p.m. and enter. Approximately fifteen minutes later, at 2:25 p.m., "Eddie" left the house, and returned to the laundromat where, at 2:35 p.m., she delivered the quarter-pound of methamphetamine to Foree. Foree chemically tested the substance and determined it to be methamphetamine. "Eddie" stated that she wanted $5,000 for the methamphetamine (this being the amount she and Foree had agreed upon). She then told Foree that she needed to return to the house as soon as possible as the appellants were about to leave. Foree gave the signal for the surveillance officers stationed at the laundromat to arrest "Eddie."

Meanwhile, at approximately 2:40 p.m. the officers on surveillance at the house observed a brown car stop in front of the house. A white male got out of the car and went inside. The surveillance officers relayed this information to Officer Foree by radio. During the next ten minutes, the surveillance officers saw someone looking out the windows of the residence. Officer Wolsch, one of the surveillance officers, testified on direct examination that it appeared to him that the persons in the house "were expecting somebody to come back to the residence or that they were watching as to what was going on outside the residence." After arresting "Eddie," Officer Foree and his supervisors determined that the premises must be secured immediately. The officers entered the house, found appellants in the kitchen area, arrested them and warned them of their *Miranda* rights.[1]

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[1] *Miranda v. Arizona*, 86 S.Ct. 1602, 384 U.S. 436, 16 L.Ed.2d 694 (1966).

On the kitchen table, in plain view, were a set of scales with white powder on them. This powder was later determined to be methamphetamine. A search warrant was soon thereafter obtained, and the officers searched the house. More methamphetamine was found in a closet in a bedroom. The methamphetamine was admitted into evidence over appellants' objection.

Appellants contend that the arrest and subsequent search were unlawful. Specifically, appellants argue that the Court of Appeals misconstrued Article 14.04 V.A.C.C.P., and that the state did not adequately discharge its burden of proving sufficient exigent circumstances to justify the warrantless entry of the house.

This Court has reiterated many times the sound advice that a police officer should always obtain an arrest warrant when possible. Randall v. State, 656 S.W.2d 487, 490 (Tex. Cr. App. 1983); Hardison v. State, 597 S.W.2d 355, 357 (Tex. Cr. App. 1980); Honeycutt v. State, 499 S.W.2d 662, 663-64 (Tex. Cr. App. 1973). Under certain specific factual circumstances, however, there are several statutory exceptions to this rule.[2] One such exception exists in Article 14.04, supra. Article 14.04, supra, provides the following:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused."

This statute imposes greater restrictions on peace officers than does the federal constitution as interpreted by the United States Supreme Court, Milton v. State, 549 S.W.2d 190, 192 (Tex. Cr. App. 1977), and, in order for an arrest to be lawful under Article 14.04, supra, the concrete factual makeup of the particular case must come squarely within the framework established by the statutes. Honeycutt v. State, supra at 665. Appellants contend that this has not occurred in this case.

Appellants argue first that "Eddie" does not meet the standards of a "credible person" as required by Article 14.04, supra. In order to establish that someone is a "credible person," the facts must give rise to more than just a "mere assertion or conclusion" of that person's credibility. Cole v. State, 484 S.W.2d

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[2] See, e.g. Articles 14.01-14.04, V.A.C.C.P. See also Article 18.16, V.A.C.C.P.

779, 782 (Tex. Cr. App. 1972) (citing Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and Stoddard v. State, 475 S.W.2d 744 (Tex. Cr. App. 1972)). In other words, the facts must show her to be one that is "worthy of belief." See Beeland v. State, 193 S.W.2d 687, 690 (Tex. Cr. App. 1946).

We find that, under the facts above, "Eddie" satisfied Article 14.04, supra, as being a "credible person." Truitt v. State, 505 S.W.2d 594, 597 (Tex. Cr. App. 1974) employs the best comparative analysis for this case. In *Truitt*, this Court held the warrantless arrest for possession of marihuana of the defendant unlawful because the informant the police officers relied upon to make the arrest was found not to be credible. One of the primary reasons given for this holding in *Truitt* was that, as here, the dispatching officer had never before received any information from the informant before and therefore had no way of knowing whether or not the informant was credible. However, the opinion went on to state that "the record reflects that in the brief conversation between the anonymous informant and [the dispatching officer] the informant did not relate any circumstances by which he came to know that [the defendant] possessed contraband." 505 S.W.2d at 597. Here, however, "Eddie" had discussed this particular drug purchase four times with Officer Foree, and, when Foree met with her, "Eddie" gave Foree a "Sample" of the drug, and later returned with the full quarter-pound of methamphetamine. "Eddie's" actions (i.e. moving the location of the purchase closer to the house where the methamphetamine was, going twice to that house and twice returning with the methamphetamine she said she was going to pick up) gave the officers the circumstances by which they would learn the appellants actually possessed the methamphetamine. *Truitt* went on to point out that "the credibility of the informant was not and could not be verified." *Id.* Again, "Eddie" returned to the laundromat, as she had initially promised, with the quarter-pound of the drug. Thus, these actions by "Eddie," as observed by the surveillance officers, were the necessary verification of her credibility. This Court also went on to note in *Truitt* that there was no indication from the record whether there was "surveillance or any information gathered by the officers relating to [the defendant] that would support either the reliability of the informant or the informant's conclusion." 505 S.W.2d at 598. Here, however, the reports by the officers on surveillance at the house confirmed all that "Eddie" had told Foree she was going to do; i.e. that she had

gone to get the "sample" of the drug, had returned to pick up the quarter-pound, and that others inside the house were looking out the windows as if waiting for someone to return. We conclude that "Eddie" established herself to Officer Foree as a "credible person" under Article 14.04, supra.

Appellants also argue that the state failed to show that the officers knew them to be the "offender[s]" under Article 14.04, supra. We disagree. It was not necessary that "Eddie" would have been required to specifically identify *who* she was getting the methamphetamine from. The officers conducting surveillance at the premises and at the laundromat provided the necessary indentifying link to show "Sufficient proof" that appellants were the offenders. To require "Eddie" to have given to Foree specific information regarding who was supplying her with the methamphetamine is simply not a requirement of Article 14.04, supra. The statute does not require that the "credible person" identify, or be able to identify, the "offender." All that Article 14.04 requires from a "credible person" is "satisfactory proof . . . that a felony has been committed, and that the offender is about to escape" so that the officer realizes that "there is no time to procure a warrant . . ." The information obtained from the officers conducting surveillance supplied that required information.

Appellants cite as authority English v. State, 647 S.W.2d 667 (Tex. Cr. App. 1983) for the proposition that the officers must know who the "offender[s]" are in order to conduct a lawful warrantless arrest under Article 14.04, supra. In *English*, police officers were conducting an investigation concerning an aggravated robbery that had occurred earlier that day. The officers went to an apartment where they believed the defendant to be, and spoke with a woman regarding the whereabouts of the defendant. The woman told them that he was asleep and did not want to disturb him. The officers heard a distrubance somewhere in the apartment, entered the apartment, and arrested the defendant. This court held the arrest unlawful under Article 14.04, supra, for the following reasons:

> "The officers testified that at the time of the entry appellant was not a suspect, that they sought only to obtain information from him, not to arrest him. They had descriptions of the offenders, but they had not yet seen appellant. Their testimony compels the conclusion that at

> the time of the entry the officers did not have 'satisfactory proof' that appellant was 'the offender.'"

647 S.W.2d at 671. *English* is distinguishable from the instant case in that here the officers did have as suspects the men in the residence, whereas in *English* the officers at that point in their investigation did not have any suspects, but had only a description of the offenders. The information obtained by the officers in the instant case from their surveillance was enough under Article 14.04, supra, to constitute "satisfactory proof" that the appellants were "the offender[s]." Cf. Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142, 145 (1964)("Whether the warrantless arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense.").

Appellants argue that there was no proof that the appellants were about to escape as is required by Article 14.04, supra. We disagree.

The escape requirement of Article 14.04, supra, is perhaps the most nebulous element of the statute. Whereas it is well settled by case law from this Court that "imminent escape" on the part of the offender is a fundamental prerequisite to a valid warrantless arrest pursuant to Article 14.04, supra, Randall v. State, 656 S.W.2d 487, 490 (Tex. Cr. App. 1983); Hardison v. State, 597 S.W.2d 355, 357 (Tex. Cr. App. 1983); Hogan v. State, 631 S.W.2d 159, 161 (1982); King v. State, 631 S.W. 2d 486, 497 (Tex. Cr. App. 1982), cert. denied, 103 S.Ct. 238 (1982); Honeycutt v. State, supra, at 664-65; Rippy v. State, 53 S.W.2d 619, 627 (Tex. Cr. App. 1931) (State's Motion for Rehearing) (imminent escape is "indispensable"), and a "clear showing that the person arrested was about to escape" will be required by this Court, Honeycutt v. State, supra, at 665, this Court has held that Article 14.04, supra, does not require a showing that the offender *in fact* was about to escape, nor does it require a showing that there *in fact* was no time to procure a warrant. Fry v. State, 639 S.W.2d 463, 476 (Tex. Cr. App. 1982)(Opinion on State's Motion for Rehearing) cert. denied, 103

S.Ct. 1430 (1983).[3] All that Article 14.04 requires is a showing that the arresting officer was acting upon "satisfactory proof" from representations by a credible person that the felony offender "is about to escape, so that there is no time to procure a warrant." *Id.*

Therefore, the key element in finding whether or not the officers believed "the offender was about to escape" is to examine the "satisfactory proof" the officers possessed. Receipt of said proof can be shown, for example, by the arresting officer's objective manifestations that appear from the record. In Lowery v. State, 499 S.W.2d 160, 165 (Tex. Cr. App. 1973), the arresting officers obtained a search warrant and arrested the defendant. The Court later concluded that the affidavit issued to the magistrate was not sufficient to constitute probable cause, therefore the arrest warrant was invalid, and the arrest was unlawful. The State then argued that the arrest was still valid as a warrantless arrest under Article 14.04, supra. This Court disagreed, stating that the record showed that the officers first obtained an arrest warrant which made "evident that [the arresting officers] had no such belief [that the offenders were about to escape] and could not have justified a warrantless arrest under Article 14.04, V.A.C.C.P." *Id.* Therefore, such objective manifestations (e.g. officers who had first obtained an arrest warrant) can be evidence that the officers did not rely upon the Article 14.04 warrantless arrest requirements.

"Eddie" told Officer Foree that she was to return to the house quickly because they were about to leave. The issue then becomes whether or not this was "satisfactory proof" to give the officers the belief that the offenders were about to escape. We hold that it was. This court has held similar responses by "credible person[s]" to be sufficient to uphold warrantles arrests under Article 14.04, supra. In Flanagan v. State, 465 S.W.2d 755, 756 (Tex. Cr. App. 1971), the mother of the defendant told the police officer, inter alia, that the defendant and a companion were at an apartment and were about to leave town. This court held that the officer had probable cause to arrest the defendant without a warrant. In Maloy v. State, 582 S.W.2d 125, 128 (Tex. Cr. App. 1979), the arresting officers heard reports from the co-defendant that the defendant was about to "bug out," or flee. This was held to be sufficient to give the officer the belief that the defendant was about to escape. In Tarpley v.

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[3] The use of the specific words "about to escape" is also not a prerequisite in order to authorize a warrantless arrest under Article 14.04, supra. Rose v. State, 470 S.W.2d 198, 200 (Tex. Cr. App. 1971).

State, 565 S.W.2d 525, 530 (Tex. Cr. App. 1978), the arresting officers were informed by a motel manager that the defendants were preparing to leave the motel where they were staying. This Court held that the police officers had probable cause to believe that the defendants were about to flee, and the warrantless arrest was lawful. In addition, this Court also held the fact that a defendant was not in the act of escaping at the time of the arrest is immaterial to the escape requirement of Article 14.04, supra. 565 S.W.2d at 530. Finally, in Fry v. State, supra, a robbery victim told the police that the defendant told him that "Just as soon as [the defendant] got back and packed his stuff up, he was leaving." This Court held this to be "clearly sufficient to constitute a 'report that the offender is about to escape, so that there is no time to procure a warrant.'" *Id.*

If the record is devoid of any evidence from which the officers would have believed the appellants were about to escape so as to make it impractical for the arresting officer to secure a warrant for their arrest, then the arrest will be unlawful under Article 14.04, supra. See Green v. State, 594 S.W.2d 72, 74 (Tex. Cr. App. 1980). See also Pearson v. State, 657 S.W.2d 120, 121 (Tex. Cr. App. 1983). Here, the officers were told that the suspects were about to leave the premises. The record reflects that the officers knew nothing about appellants. They also knew nothing about whether or not appellants used the premises as a residence, a speed laboratory, or just a house from which they conducted the business of selling methamphetamine. The officers did know, however, that they were going to leave the premises, with the possible effect of never being seen again. Cf. Bell v. State, ____ S.W.2d ____ (No. 68,989, delivered March 19, 1986). Thus, the officers possessed "satisfactory proof" that the offenders were about to leave the house so as to make it impossible to obtain a warrant prior to arresting the suspects.

We conclude that the warrantless arrests of the appellants were valid under Article 14.04, supra.

The appellants next argue that the State did not adequately discharge its burden to prove sufficient exigent circumstances to justify the warrantless entry of appellants' home. Our holding above is dispositive of this contention. We overrule appellant's second contention.

Accordingly, the judgment of the Court of Appeals is affirmed.

PER CURIAM

(Delivered September 17, 1986)
EN BANC
DO NOT PUBLISH
Onion, P.J., concurs in the result

DENNY EDWARD ROBERTS,
Appellant

NO. 1033-84 v.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review from the Court of Appeals, Third Supreme Judicial District of Texas (TRAVIS COUNTY)

HERMAN SANFORD BENNETT,
Appellant

NO. 1034-84 v.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review from the Court of Appeals, Third Supreme Judicial District of Texas (TRAVIS COUNTY)

CONCURRING OPINION

Having examined the search warrant obtained by the officers prior to a full search of the house in question, I am of the opinion that it contains adequate probable cause to justify its issuance. The affidavit in support of the search warrant is some 80 typewritten lines long. Two of these lines deal with the finding of methamphetamine in the house prior to issuance of the warrant. Excising these two lines, the affidavit more than furnishes probable cause for the issuance of the search warrant.

This being the case, the police did nothing more than secure the premises and obtain a search warrant using the information (narrated in the majority opinion) about "Eddie" and the premises and the surveillance employed. I don't see any need to get involved in the question of whether or not the appellants were about to "escape". The fruits of the search conducted pursuant to the search warrant and the fruits found earlier during the securing of the premises (and which would have been inevitably discovered in the warrant search), were properly admitted into evidence.

I concur in the result.

Miller, Judge

Delivered: September 17, 1986
En Banc
Do Not Publish
Campbell, J., joins.

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Petition for Discretionary Review from the Court of Appeals, Third Supreme Judicial District of Texas (TRAVIS COUNTY)

DISSENTING OPINION ON APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

They say a little knowledge is a dangerous thing.

On the basis of the mere possibility, fueled by negatives, that were the occupants of the house at 1613 West 9th Street to leave they might never be seen again, the majority finds the officers had "satisfactory proof" of escape in this cause:

> ". . . The record reflects that the officers knew nothing about appellants. They also knew nothing about whether or not appellants used the premises as a residence, a speed laboratory, or just a house from which they conducted the business of selling methamphetamine. The officers did know, however, that they were going to leave the premises, with the *possible* effect of never being seen again."[1]

Slip op. at p. 11. Incredibly, the majority invites us to "Cf." Bell v. State, 707 S.W.2d 52 (Tex.Cr.App. 1986) for support.[2]

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[1] Emphasis supplied.

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[2] Before probable cause to arrest Bell had crystalized, investigators had already determined he could not be found at his last known address. Later information provided probable cause to believe Bell had perpetrated the murder. It was also learned that though Bell had been warned police were looking for him, he could presently be found at the Satellite Bar. Because the bar was scheduled to close within a half hour of the receipt of this information, officers were dispatched to the bar, where Bell was indeed

By focusing primarily on what the arresting officers did *not* know in finding they had "satisfactory proof" appellants were "about to escape, so that there is not time to procure a warrant," the majority turns Art. 14.04, V.A.C.C.P., on its head.

What the officers *did* know sheds little light on the question whether "escape" of the occupants of the house at 1613 West 9th Street was imminent. They knew that "Eddie" had stated "she needed to return with the money as quickly as possible because the people were about to leave." It *appeared* to the officers that "the people" in the house "were expecting somebody to come back to the residence or that they were watching as to what was going on outside the residence." These facts cut both ways, however. If the officers had probable cause to believe that the occupants of the house were actually supplying "Eddie" with the methamphetamine, they must also have concluded they would take a substantial cut of the $5000.00 negotiated purchase price. Thus, while the occupants of the house may have been in a hurry to leave, "Eddie's" statement to police indicates they would have been reluctant to do so before she returned with the payment.

Nevertheless, indulging the presumption that the occupants would have left before "Eddie" returned, this alone does not constitute "about to escape," as indeed *Bell v. State,* supra, illustrates.

Perhaps the officers believed that when "Eddie" did not return promptly with the payment the occupants of the house would grow suspicious and abandon the premises as their base of operation. But there is no objective showing that the occupants of the house knew the police were on to them. That perhaps they soon would suspect so,

apprehended. In determining that this warrantless arrest was *not* authorized under V.A.C.C.P., Art. 14.04, Judge Miller opined:

> "Although [the investigator] testified that he could not have obtained a warrant before the bar closed, there is no evidence that appellant was about to escape or that the officers thought he was about to escape. [The informant] told the police that he had warned appellant earlier in the day that the police were looking for him, but appellant was still in the vicinity at a local bar at midnight. 'It is the information that an escape is imminent which dispenses with the necessity of a warrant of arrest.' Bain v. State, 677 S.W.2d 51, 56 (Tex.Cr.App. 1984), quoting Rutherford v. State, 104 Tex.Cr.R. 127, 283 S.W. 512, 514-515 (Tex.Cr.App. 1926). Because of the absence of the required exigent circumstances, we hold the arrest was improper."

707 S.W.2d at 59. Though Bell knew he was being pursued, he was obviously not attempting to elude apprehension. Thus, *Bell v. State,* supra, makes clear that under such circumstances, just because a suspect may soon leave a known location perhaps never to be seen again does not necessarily mean there is "satisfactory proof" he is escaping.

because of "Eddie's" failure to return after a reasonable time, is purest speculation.[3] What from an officer's experience seems possible under the circumstances does not by itself amount to "satisfactory proof."[4]

If the officers had some objective reason to believe the occupants of the house suspected they were being scrutinized, and the occupants had actually begun to leave the premises, e.g., in the brown car, then from the "concrete factual situation spread on the record" it would be apparent that the occupants were indeed about to escape. Randall v. State, 656 S.W.2d 487, 490 (Tex.Cr.App. 1983), quoting King v. State, 631 S.W.2d 486, 497-498 (Tex.Cr.App. 1982). Without some objective indicia of flight, however, the officers were not authorized to arrest appellants based upon what the occupants *might* do when "Eddie" failed to return.

Regardless of whether the house in this cause was their residence or simply the base of operations for their drug selling business, absent "satisfactory proof" the occupants knew their operation had been discovered, it was more reasonable than not to assume that they *would* be found there in the future.

I dissent.

CLINTON, Judge

(Delivered September 17, 1986)
EN BANC
DO NOT PUBLISH

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[3] Pursuant to appellant's motion to suppress under V.A.C.C.P., Art. 38.23, attacking at trial the validity of the seizure of the house and its occupants, Officer Wolsch testified:

> "Q And it is correct, . . . is it not, that a person probably would be quite anxious to have his $5,000 back had he just delivered some methamphetamine to someone else; is that correct?
>
> A Yes. This is a problem we run into quite often. The person would expect the money back very fast or often wants part of the money fronted or all of the money fronted, or has a time period that the money must be back by.
>
> Q In a situation such as this, the girl goes just two blocks away and does not return with the $5,000 very quickly, would you say that the person would become very anxious about a situation like that?
>
> A Yes, I would."

In fact, however, further testimony strongly suggests that what the officers were primarily concerned about was not the "escape" of the occupants, but the possible destruction of evidence. Officer Foree, the search warrant affiant, testified that the

decision to "secure" (as the officers repeatedly characterized it) the house was made at the washateria just after "Eddie's" arrest:

"Q How did you become aware that in fact entry was made to the residence prior to the time the warrant was obtained?

A Because we discussed it before we did it.

Q You discussed it on the telephone?

A No. We discussed it at the washateria.

Q At the washateria, what was the substance of that discussion?

A We decided that it would be better to just go ahead and secure the residence at that time so that we wouldn't have any other people coming and going from the residence and hopefully not to allow the people to destroy any further evidence that would be in the residence.

* * *

Q . . . You were worried about destruction of evidence, you said.

A That was part of it, yes sir.

Q All right. Why were you worried about destruction of evidence?

A Because we were afraid the people were going to leave or that they would destroy the evidence.

Q Isn't that a factor in every case in which there is a buy?

A It is in a case where—such as this, yes."

It is clear from the statement of facts that in denying appellant's motion, the trial court was most concerned not with "escape," but with the possible destruction of evidence once "Eddie" failed to return. Possible destruction of evidence is not, however, an exigency covered under V.A.C.C.P., Chapter 14.

One can only wonder why, if the officers were so concerned about arousing the suspicions of the occupants of the house, they didn't simply allow "Eddie" to return with the $5000.00 and arrest her later. That would certainly have iced their probable cause to believe the occupants of the house were her suppliers, a fact which, incidentally, the magistrate who issued the search warrant was not willing to concede absent evidence of what was found inside the house once it was "secured."

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[4] The Court has observed that [t]he legislative prescription of what must be 'shown by satisfactory proof' is the legal equivalent of constitutional probable cause." Earley v. State, 635 S.W.22d 528, 531 (Tex.Cr.App. 1982). As I have observed elsewhere in the probable cause context, the Court must be wary of reducing that standard to the level of "simply that which under the circumstances cannot be ruled out." Osban v. State, ___ S.W.2d ___ (Tex.Cr.App., No. 368-83, delivered this day) (Clinton, J., dissenting).

DENNY EDWARD ROBERTS AND HERMAN SANFORD BENNETT, Appellants

NOS. 1033 & 1034-84 vs.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Third Supreme Judicial District of Texas (TRAVIS COUNTY)

DISSENTING OPINION

The desire for making it easier to prosecute criminals in this State has never before today been a factor in how this Court might interpret the laws of this State, and how this Court might apply those laws to a particular case. Today, however, given the majority opinion, a majority of this Court's members, apparently in their desire to conduct their own small war on drugs, and presumably "to uphold law and order," acting as magistrates of course, exchange their robes for police officer uniforms and proceed to do the work that the police should have done, but did not do, in this cause. Oh, well, because the police in this cause made a successful "bust," who cares about such subjects as warrantless arrests and searches, warrantless entries into residences, using a sledgehammer in order to make a warrantless entry into another person's residence, etc.? I, for one, do.

To what the majority opinion does to our law, I respectfully dissent. I also dissent for the reasons expressed in the dissenting opinion that I filed in *West v. State*, -S.W.- (Tex.Cr.App., No. 69,109, delivered this date).

Contrary to what the majority opinion might imply, this case has several scenes in it and not just one.

The first scene concerns the "reliability and credibility" of "Eddie," hereinafter just called Eddie, who was just trying to make some money by selling Delbert Foree, an undercover Austin police officer, some methamphetamine[1] that she then had. By delivering the meth to Foree, Eddie herself was subjected to a warrantless arrest and search, and criminal charges were apparently filed against her. Whether or not she was prosecuted for delivering the meth to Foree is not revealed by the appellate record.

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[1] Hereinafter referred to as "meth."

Given the facts and circumstances of this case, at first blush Eddie closely resembles an informer working for the police. However, that is not true as Eddie was shown to be part of the criminal element that specializes in the unlawful sales of methamphetamine.[2] Nevertheless, given the tenor of the majority opinion, that based upon Eddie's statements to Foree, this warranted what the police did after they entered without a warrant the residence of the appellants and without a warrant arrested the appellants, in order to appreciate the first scene of the play, it is therefore necessary to consider Eddie in the same light as one might view an informer for the police.

It is now axiomatic that if the probable cause assessment is based on information received from an informer, the standards for determining probable cause are the same as for a magistrate's assessment prior to the issuance of a search warrant. *Colston v. State,* 511 S.W.2d 10, 12 (Tex.Cr.App.1974). In that regard, before a warrantless arrest or search of a person may be based upon an informer's statement, it is necessary that the police establish that the informer has a valid basis for his belief that a crime was being committed or had been committed, that evidence of that criminal act could be seized from the accused, and that the officer relying upon the informer's statement had sufficient reason to believe that the informer was credible and/or his information reliable. Credibility and reliability are not necessarily synonymous in that instance, for an informer may be reliable, but not necessarily credible, and credible, but not necessarily reliable. Thus, more than "reason to believe," or conclusions, expressed by the informer, that the accused possessed contraband, must be shown before probable cause exists. *Brunson v. State,* 506 S.W.2d 594 (Tex.Cr.App.1974). Of course, corroboration of the informer's statements may fill any void, but the additional information must be corroborative of the belief that the accused is committing or has committed a felony. *Truitt v. State,* 505 S.W.2d 594, 597-598 (Tex.Cr.App.1974).

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[2] In reviewing the testimony that went to Eddie, one can easily conclude therefrom that Eddie is no Mary Hernandez, who waged her own personal war on drugs in Austin back in the late 1960's and early 1970's. Except for a few well-known "dopeheads" getting convicted, Mary's efforts to stamp out illicit drug trafficking in Austin were unsuccessful. For cases that Mary made, however, see *Martinez v. State,* 471 S.W.2d 399 (Tex.Cr.App.1971); *Perales v. State,* 471 S.W.2d 401 (Tex.Cr.App.1971); *Gomez v. State,* 461 S.W.2d 422 (Tex.Cr.App.1971); *Arechiga v. State,* 462 S.W.2d 1 (Tex.Cr.App.1971); *Corpus v. State,* 463 S.W.2d 4 (Tex.Cr.App.1971); and *Caudillo v. State,* 462 S.W.2d 576 (Tex.Cr.App.1971).

Other than the fact that Eddie, a white female, *perhaps* had a 10-year-old daughter, we are given little information in this record about her or her background. The record, however, makes it clear that Eddie was in the business of distributing methamphetamine.

Prior to the day in question, Foree spoke with Eddie on four different occasions about purchasing 1/4 pound of meth. However, Foree apparently took no steps to investigate just who Eddie might be. From the record before us, Foree had never previously heard of Eddie. Nevertheless, on January 16, 1982, a cold, Saturday morning in Austin, Foree finally met Eddie, who was then accompanied by, presumably, her 10-year-old daughter. The three met at a cafeteria located in Austin near what has now become the medical center area of Austin. The object of the meeting between Eddie and Foree was so that Foree could purchase some meth from Eddie. However, Foree apparently did not then, or later for that matter, attempt to obtain any information about Eddie's background or who her suppliers, if any, might be. Apparently, after introductions were made by these two total strangers, Eddie instructed Foree to follow her to a laundromat located on West Lynn Street in Austin, which he did. There, Foree, who until that day was visibly a total stranger to both Eddie and her 10-year-old daughter, was left to babysit the 10-year-old child. Eddie then left Foree to go and get the 1/4 pound of meth. Foree apparently did not even seek to find out from Eddie where she was then going to get the meth, nor did he inquire who, if anyone, might be her supplier. Apparently, Foree was content at that time to just babysit until Eddie returned with the meth. Foree had advised Eddie that he was willing to pay $5,000 for that quantity of meth. As Eddie is not shown to have then had any money, or at least that sum of money, and as there is no showing that at that time Foree gave her any money, how she was going to obtain or purchase the meth from somebody else without any money is itself a rather interesting question, as common sense, if not common knowledge, tells us that dope dealers do not release that valuable a cargo without being assured that they are truly going to get the money in exchange for their goods.

Although Foree apparently did not know where Eddie went, after she left the laundromat to go and get the meth, several of Austin's other finest placed Eddie under surveillance, and tracked her to 1613 West 9th Street, three blocks away, which location was later shown to be the appellants' residence. Eddie arrived at that location at approximately 12:15 p.m. and thereafter left at approximately 12:30 p.m. Eddie soon returned to where Foree was situated, but without the 1/4 pound of meth that she had promised Foree.

Instead of 1/4 pound of meth, Eddie gave Foree only a small "sample" which she retrieved from a small plastic bag. Whether this "sample" actually came from inside of the residence is not reflected by this record. Eddie "indicated" to Foree that there was more meth available and, again apparently without any money, she returned to the residence, but whoever was on the inside of the residence would not let her inside of the residence at that time. Eddie returned to the laundromat at approximately 12:45 p.m., where Foree was waiting with Eddie's 10-year-old child. Eddie then suggested to Foree that they separate and get back together at the laundromat between 1:30 and 1:45 p.m. That meeting, however, never took place.

The record does not reflect where Eddie was between 12:45 p.m. and 2:10 p.m. She did not go to the residence because it was still under surveillance and none of the officers testified that she was seen at that location during that period of time. For all we know from this record, Eddie could have then gone elsewhere to get the meth.

At approximately 2:10 p.m., Eddie was seen by the police surveillance team arriving in her car at the residence. Eddie got out of her car, went inside, stayed approximately 15 minutes, and then returned to the laundromat where she turned over to Foree what he suspected to be 1/4 pound of meth. The record does not reflect that the meth came from inside the residence, and it is just as likely from this record that it could have come from inside of Eddie's automobile as from the residence. Eddie then told Foree that he should give her the $5,000 so that she could return to the residence and turn the money over to whomever, as whomever was then waiting for her to return, and as soon as she returned whomever was going to leave the residence. Foree than arrested Eddie, and presumably searched her and charged her. Foree then notified the members of the surveillance team of what he had done.

While Eddie and Foree were then meeting, those police officers who had the appellants' residence under surveillance observed the appellant Roberts drive up to the residence in an automobile, get out, and go inside the residence. Soon thereafter, someone appeared to look out a window.

Soon after the members of the surveillance team heard from Foree, they then made the decision to use a sledgehammer to enter the residence and secure it and all persons and any contraband that might then be inside of the residence until a search warrant could be obtained. The residence was then secured. A search warrant was finally obtained approximately two hours later. The State does not rely upon the search warrant to justify the warrantless entry.

The State, understandably, concedes that the above information that Eddie provided "might not alone have been sufficient to establish probable cause." See page 7, State's reply brief. Given the fact that when Eddie was arrested the police did not have probable cause it is understandable why they then did not make any efforts to procure a search warrant.

Art. 14.04, V.A.C.C.P., provides: "When it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused." By its very wording, and especially in light of the fact that we have special statutes that cover search warrants for residences, this statute clearly does not authorize a warrantless entry into another's residence—under any circumstances, not even when exigent circumstances are present.

I pause to point out that a warrantless entry and search of one's abode has long been condemned in these United States and in this State, *even when such entry was based upon probable cause* to believe that an offense was being committed inside of the residence. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Cagle v. State*, 147 Tex. Cr.R. 299, 180 S.W.2d 928, 937 (Tex.Cr.App.1944); *Giacona v. State*, 372 S.W.2d 328, 332 (Tex.Cr.App.1963); *Tarwater v. State*, 160 Tex.Cr.R. 59, 267 S.W.2d 410 (Tex.Cr.1954); *Giles v. State*, 133 Tex.Cr.R. 454, 112 S.W.2d 473 (Tex.Cr.App.1938); *Williamson v. State*, 156 Tex.Cr.R. 520, 244 S.W.2d 202 (Tex.Cr.App.1951). Cf. *Stoddard v. State*, 475 S.W.2d 744 (Tex.Cr.App.1972).

The majority opinion, however, latches onto the provisions of Art. 14.04, supra, to give the police in this cause the right to make a warrantless entry of the appellants' residence and a warrantless arrest of their persons.

Although this interpretation of the law is clearly erroneous, I will nevertheless demonstrate why this statute is not applicable to this cause.

The first question here is the "credibility" of Eddie as it relates to whether it was probable that there was contraband inside of the residence, and *not* her credibility as to whether she herself actually committed a criminal act, because the latter has clearly been established beyond a reasonable doubt.

The word "credibility" is usually defined to mean the following: "the quality or power of inspiring belief." *Webster's Ninth New Collegiate Dictionary* 305 (1985 edition). One is usually considered to

be "credible" regarding a particular subject if he or she offers reasonable grounds or reasons for being believed as to what they might say about that subject. Whether a person is "credible," or is capable of inspiring belief in a particular subject, must, of course, be judged on an ad hoc basis.

In this instance, we are not apprised of any facts that might reflect or demonstrate that Eddie had any particular knowledge of methamphetamine or any expertise as to ability to identify that controlled substance; in fact, as to her background, Foree knew absolutely nothing about her. The conversations that Eddie had with Foree did not concern the appellants. Although Eddie gave the appearance that she had complete access to the residence, we also know that she was barred from entry on one occasion. Eddie's whereabouts were not at all times known by or accounted for by the police. Although Eddie gave the appearance that she had been inside of the residence on many occasions, at no time did she reveal to Foree names of persons who might have been inside of the residence when she was there, the location of the 1/4 pound of meth, assuming it came from inside of the residence, or anything else that might have shown familiarity with the inside of the residence. Eddie was never witnessed carrying anything illegal from the residence, and, as mentioned, at no time did Eddie ever tell Foree that either or both of the appellants were in possession of any unlawful contraband, or delivered the meth to her.

Thus, specifically as to the appellants, the above facts do not reflect or indicate that based upon Eddie's statements to Foree probable cause to arrest the appellants with or without a warrant was shown or established. See *Brunson v. State,* supra. Cf. *Ceniceros v. State,* 551 S.W.2d 50 (Tex.Cr.App.1977). The statute makes it clear that the "credible" person must witness two things, namely, the commission of a felony *and* the person who committed that offense. Here, at no time did Eddie relate to Foree, or anyone else for that matter, that the appellants had committed any offense, must less a felony offense. Thus, Eddie's "credibility," that the appellants committed a felony, has yet to be established.

The next question, however, is whether, in combination, Eddie's statements to Foree and her actions, together with the officers' surveillance, caused probable cause to exist to establish that the appellants had committed a felony.

Given the above facts and circumstances, it should be unquestioned that if we use the usual legal definition of probable cause, even when the facts are viewed in combination, they do not

establish probable cause that the appellants committed a felony offense.

"Probable cause," until today, has usually meant more than the arresting officer having an inarticulate hunch, good faith belief or suspicion that the arrestee has committed or is in the course of committing a criminal wrong. See *Fatemi v. State,* 558 S.W.2d 463 (Tex.Cr.App.1977); *Honeycutt v. State,* 499 S.W.2d 662 (Tex-.Cr.App.1973).

The majority opinion holds that Art. 14.04, supra, creates another exception to a warrantless entry of a residence. It does not. In fact, such does not even mention or allude to a warrantless entry into a residence.

But, even assuming there is such a strange exception in our law, where under the facts of this case is there justification to believe that the appellants were about to escape and there was not time to procure a warrant? Cf. *Pearson v. State,* 657 S.W.2d 121 (Tex.Cr.App.1983); *Hardison v. State,* 597 S.W.2d 355 (Tex.Cr.App.1980); *Rippy v. State,* 53 S.W.2d 619 (Tex.Cr.App.1932).

The majority opinion states that in this instance the police were justified in making a warrantless entry because "the surveillance officers saw someone looking out the windows of the residence . . . [and] it appeared [to them] that the persons in the house 'were expecting somebody to come back to the residence or that they were watching as to what was going on outside the residence.'" The majority opinion also relies upon Eddie's statement that "they," without referring to the appellants by name, were about to leave the premises. As to the "expecting somebody to come back to the residence or that they were watching as to what was going on outside the residence," this does not implicate any idea of escape on the part of the occupants of the premises. There is not anything in the record that this might relate to appellants. Given Eddie's habits, it is extremely doubtful that this could relate to Eddie. Given the fact that there is no showing that Eddie knew that the appellant Roberts was going to arrive when she was at the laundromat, it is also reasonable to presume or assume that the occupant or occupants of the house weren't expecting someone. If in fact they were expecting anyone, it was other than Eddie. Eddie's statement that "they were about to leave" in no way suggests or indicates that the occupants were about to escape. For all anyone knew, they could have been planning to leave the residence to go and get a pizza and some beer. There is simply nothing to support the inference that anyone in the residence was going to leave and *never come back again.* There is also no evidence to

reflect or indicate that the occupants had packed their personal belongings preparatory to leaving.

The majority opinion is thus clearly in error in holding that "the officers possessed 'satisfactory proof' that the offenders [, whoever "they" might have been], were about to leave the house so as to make it impossible to obtain a warrant prior to arresting the suspects."

I pause to point out that Austin police officers who make drug busts do read appellate court opinions. In *Faulk v. State,* (Tex.App.Austin, No. 03-82-00425, April 26, 1983), P.D.R. refused May 9, 1984, a case from Travis County, the justification for making a warrantless entry into a residence was that an "officer 'felt' that appellant had heard all the noise and commotion outside his house, and that [the officer] was afraid the defendant would destroy the evidence and run away." Apparently, in this instance, the officers were silent in making their approach to the appellants' residence. However, like here, in *Faulk,* supra, prior to making the warrantless entry, one of the officers there saw the defendant in that cause looking through an open window, thus causing the officer to become suspicious that the defendant might have observed something "fishy" going on outside the residence. This Court implicitly but erroneously sustained the entry.

My research reveals, with the possible exception of this Court's two judge panel decision of *Hennessy v. State,* 660 S.W.2d 87 (Tex.Cr.App.1983), which is not applicable to this cause because the issue was not raised therein, this Court has never before today held that a warrantless arrest made pursuant to Art. 14.04, supra, and inside of a residence, is permissible on the mere showing that an officer *suspected* or *believed* that the offender inside thereof was about to escape. In fact, in *Early v. State,* 635 S.W.2d 532 (Tex.Cr.App.1982), this Court recently held that "the legislative proscription of what must be shown by satisfactory proof is the legal equivalent of constitutional probable cause."

Given the facts of this case, there is simply no evidence that the entering officers were acting upon satisfactory proof from representations by a credible person that the appellants were about to escape. *Pearson v. State,* 657 S.W.2d 120 (Tex.Cr.App.1983); *English v. State,* 647 S.W.2d 667 (Tex.Cr.App.1983). Also see *Honeycutt,* supra.

The State, however, does not actually rely upon the provisions of Art. 14.04, supra, to justify the warrantless sledgehammer entry into the appellants' residence; it relies, instead, upon "threatened destruction of property" as justification. In urging this exception, it has the burden to prove the justification. *McDonald v. United States,*

335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948); *Roberts v. State,* 545 S.W.2d 157 (Tex.Cr.App.1977). Except for what was later discovered, the State failed in sustaining its burden. Of course, a warrantless entry may not be retroactively justified by what evidence might turn up after the entry. *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Adams v. State,* 128 S.W.2d 41 (Tex.Cr.App.1939).

As previously observed, a person's "castle" has always been viewed as being almost sacrosanct, and, except in the most limited of exceptions, it may not be entered without a lawful search warrant. These case law exceptions are to be jealously and carefully looked upon, see *United States v. Bursey,* 491 F.2d 531 (5th Cir.1973), and are usually thought to be entry by consent; entry because of an emergency; entry in hot pursuit of a fleeing felon; entry to prevent destruction or removal of contraband *known* to be inside of the residence; entry to seize unlawful contraband seen in plain view; and entry to prevent the commission of a felony if it occurs in the presence or within the view of a peace officer. In this instance, the only possible non-statutory, case law (but not by this Court) exception that might be applied to this cause is the entry to prevent destruction of property or evidence.

In *Ker v. California,* 374 U.S. 23, 61-62, 83 S.Ct. 1623, 1644, 10 L.Ed.2d 726, 754 (1963), Justice Brennan, who authored the plurality opinion for the court, made the following observations about applying exceptions to the warrant requirement, and in particular the destruction exception:

> The recognition of exceptions to great principles always creates, of course, the hazard that the exceptions will devour the rule. If mere police experience that some offenders have attempted to destroy contraband justifies unannounced entry in any case, and cures the total absence of evidence not only of awareness of the officers' presence but even of such an attempt in the particular case, I perceive no logical basis for distinguishing unannounced police entries into homes to make arrests for any crime involving evidence of a kind which police experience indicates might be quickly destroyed or jettisoned. Moreover, if such experience, without more, completely excuses the failure of arresting officers before entry, at any hour of the day or night, either to announce their purpose at the threshold or to ascertain that the occupant already knows of their presence, then there is likewise no logical ground for distinguishing between the stealthy manner

> usually associated with totalitarian police of breaking down the door or smashing the lock.

Thus, where any exception to the requirement that a warrant must be obtained before lawful entry into another person's abode might be invoked, much depends upon the particular facts and circumstances, as articulated by the State's witnesses, whether such will be invoked and applied.

Exceptions, or what is sometimes referred to as "exigent circumstances," which justify a warrantless entry into another's residence, may be said to exist when the demands of the occasion reasonably call for an immediate police response. The burden, of course, is upon the State to prove the justification, *McDonald v. United States,* 35 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948); *Roberts v. State,* 545 S.W.2d 157 (Tex.Cr.App.1977), but a warrantless entry may not be retroactively justified by what evidence turns up. *Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Adams v. State,* 408 S.W.2d 41 (Tex.Cr.App.1939).

The leading case which explicated the exception that we concern ourselves with at this time appears to be *United States v. Rubin,* 474 F.2d 262 (3rd Cir. 1973), cert. denied, 414 U.S. 833, 94 S.Ct. 173, 38 L.Ed.2d 68 (1973), in which it was concluded that where "[g]overnment agents . . . have probable cause to believe contraband is present and, in addition, based upon the surrounding circumstances or the information at hand, they reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified." The *Rubin* court also listed *some* of the circumstances relevant to whether the emergency circumstances exist, namely:

> (1) the degree of urgency involved and the amount of time necessary to obtain a warrant . . .
> (2) reasonable belief that contraband is about to be removed . . .
> (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought . . .
> (4) information indicating the possessors of the contraband are aware that the police are on their trail . . . and
> (5) the ready destructibility of the contraband and knowledge 'that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic' . . . (268-269)

Research reveals that a majority of the State courts have held that mere presence of narcotics, without more, in not such an exigent circumstance as would permit entry into private premises without a proper warrant. I also conclude from the cases that *ambiguous* conduct cannot provide the basis for a reasonable belief that the person or persons inside a residence are destroying or attempting to destroy evidence, notwithstanding the officer might have probable cause to believe contraband is inside the residence. Furthermore, I cannot infer from the fact that a person who is in possession of valuable, albeit illicit, contraband, will always attempt to destroy the contraband. Thus, where narcotics are involved, exigent circumstances do not exist *per se* because narcotics might be easily disposed of. *People v. Lee*, 444 N.Y.Supp.2d 100 (Sup.Ct., App.Div., 1st Dept.1981); *New Mexico v. Sanchez*, 540 P.2d 858 (Ct.App.New Mex.1975); *Merrick v. Florida*, 338 So.2d 77 (Dis.Ct.App., 4th Dis.1976); *People v. Oulettette*, 401 N.E.2d 507 (Sup.Ct.Ill.1979); *People v. Gastelo*, 432 P.2d 706 (Calif.Sup.Ct.1967).

Given the facts and circumstances of this cause, there is simply insufficient evidence to support the inference that the officers had probable cause to believe that there was contraband stored in the residence and, if there was probable cause to so believe, that the contraband was about to be destroyed by its occupants.

By upholding what occurred in this cause, the majority wrongfully imperils the rights guaranteed our citizens by the Texas Constitution and our statutes governing warrantless searches and seizures. Interestingly, over 60 years ago it was written: "As to private residences, no search can ever be justified under the federal laws without a warrant." Cornelius, *Search and Seizure* (1926 edition), section 26, page 89. Given the innovativeness and intelligence of most law enforcement officers, the majority opinion rewrites the statement, "As to private residences, any warrantless search will always be justified—just give us any old reason."[3]

To the majority opinion's decimation of our citizen's Constitutional and statutory rights, I respectfully dissent.

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[3] In *Gaston v. State*, 440 S.W.2d 297, 301 (Tex.Cr.App.1969), in the concurring opinion that he filed. Presiding Judge Onion remarked:

> We should not forget that the traditional function of an appellate court opinion to furnish precedent and guidelines to the bench and bar has had added to it a new dimension, at least in criminal cases. Law enforcement officers and agencies have a vested interest in the appellate opinion in this day and age of change in the approach to criminal prosecution.

TEAGUE, Judge

EN BANC

DELIVERED:

PUBLISH

APPENDIX 3

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 1034-84
STYLE: Bennett, Herman Sanford

November 19, 1986

On this day the Appellant's Motion for Rehearing was denied.

COA#: 03-83-00084-CR

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: David L. Botsford
505 West 12th St., Suite 200
Austin, TX 78701

APPENDIX 4

COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

HERMAN SANFORD BENNETT

VS. CAUSE NUMBER 1034-84

STATE OF TEXAS

On this 26th day of November, 1986, came on to be considered the motion of the appellant's counsel for leave to file third supplemental motion for rehearing, third supplemental motion for rehearing, and motion to stay issuance of mandate pending disposition of motion for rehearing and/or the filing of a petition for writ of certiorari.

The Third Supplemental Motion for Rehearing is denied. Issuance of the mandate is stayed for 60 days.

IT IS SO ORDERED.

PER CURIAM

A TRUE COPY ATTEST:

Thomas Lowe, Clerk
Court of Criminal Appeals (SEAL)

By: Sherrie Ericson, Deputy Clerk